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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
11/10/2017
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RODERICK BEHAM, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County
Cause No. 06-16-00094-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Roderick Beham.
- The trial judge was the Hon. Bill Miller, Presiding Judge, 5th District Court, Bowie County, Texas.
- Counsel for Appellant at trial were Bowie County Public Defenders Chad Crowl and William Williams, 424 West Broad, Texarkana, TX 75501.
- Counsel for Appellant before the court of appeals was Alwin Smith, 602 Pine Street, Texarkana, TX 75501.
- Counsel for the State at trial were Assistant District Attorneys Lauren Richards and Kelley Crisp, 601 Main Street, Texarkana, TX 75501.
- Counsel for the State before the court of appeals was Assistant District Attorney Lauren Richards, 601 Main Street, Texarkana, TX 75501.
- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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No. PD-0638-17

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

RODERICK BEHAM, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County
No. 06-16-00094-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

In both its merits and harm analysis, the court of appeals treated evidence that Appellant was holding himself out as a gang member as though it were a claim of actual gang membership but with third-rate proof. The court of appeals overlooked that, even if membership was not proven, posing as a gang member was relevant to punishment in its own right.

STATEMENT OF THE CASE

Appellant was convicted of aggravated robbery. The jury's original sentence was set aside on appeal. CR 21. At the punishment retrial, the jury assessed a 40-

year sentence. CR 77. The court of appeals reversed again—this time for admission of "gang-related" testimony. *Beham v. State*, No. 06-16-00094-CR, 2017 Tex. App. LEXIS 4595 (Tex. App.—Texarkana May 19, 2017) (not designated for publication).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

ISSUES PRESENTED

1) **Is expert opinion testimony that a defendant holds himself out as a gang member—without proof he is one—relevant to sentencing?**

2) **In assessing harm, did the court of appeals err in failing to isolate the opinion testimony from the properly admitted photographs on which that opinion was based?**

STATEMENT OF FACTS

Appellant and two other people robbed a hotel night clerk. 3 RR 143, 145, 149, 168. Appellant pointed a gun at the clerk, cocked it, and ordered her to hand over the key to the safe or register. 3 RR 169, 171. When he realized she did not have a key, he stole from her instead. 3 RR 169-72.

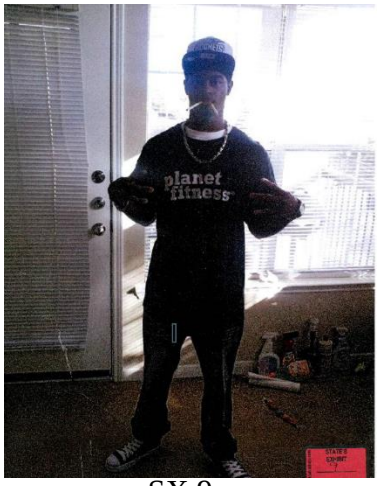
Appellant was convicted by a jury and given a 25-year sentence, but he won a new sentencing hearing on his first appeal. CR 8-9; *Beham v. State*, 476 S.W.3d

724, 737 (Tex. App.—Texarkana 2015, no pet.) (improper admission of appellant's dismissed juvenile charges). At the punishment retrial, he filed an application for community supervision. CR 44. The trial court granted Appellant's motion in limine for a hearing before the State referred to Appellant "holding himself out" as a gang member or associate. CR 38; 2 RR 15-16; 3 RR 8-10.

At the first such hearing, the State called lead detective Billy Gidden to sponsor five photos from Appellant's Facebook page. 3 RR 121-33; SX 8-12. The first of these—State's Exhibit 8—was a red-tinted cascade of images of Appellant gesturing with his hands, bordered by the words "Money Power Respect" in Old English font.

SX 8

State's Exhibits 9 & 10 showed Appellant gesturing.

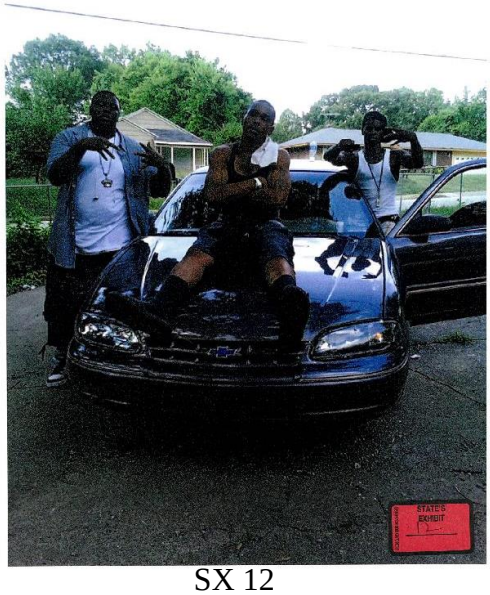


SX 9

SX 10

In State's Exhibit 11, Appellant gestured behind a table laid out with cash and bags of drugs. In State's Exhibit 12, Appellant pointed a handgun sideways at the camera alongside a car and two other men, one of whom was also making hand signs.


SX 11


SX 12

At this first hearing, the State clarified that it intended to offer the photographs but that testimony about gang affiliation would be offered through a later witness. 3 RR 123. Appellant raised various authentication objections to the photos, including that the State had not established Appellant's identity. 3 RR 132. He also objected that the photos were "being relied upon" and "offered to help add to the testimony that's going to be elicited later from the gang expert regarding [Appellant's] holding [himself] out or involvement [in a gang]." 3 RR 122-23, 132. After the trial court overruled his authentication objections, Appellant pressed the judge further:

> [DEFENSE ATTORNEY]: . . . there's still our objection that they're being used to propose to the jury that [Appellant] is either holding himself out or a member of an illegal street gang. . . the state is going to have a witness to testify . . . that those pictures are [Appellant] holding himself out as a gang member.
>
> THE COURT: Well with regard to the pictures themselves being admissible, and as to the identity, those objections are overruled.
>
> [DEFENSE ATTORNEY]: Okay.
>
> THE COURT: This witness has not been offered, at least not yet, to provide any testimony with regards to whether he's -- whether or not that's a gang affiliation or any gestures or anything of that nature, and therefore the Court's going to overrule that objection as --
>
> [DEFENSE ATTORNEY]: Yes, sir.
>
> THE COURT: -- I guess premature, because that's not been offered by the state at this point.

3 RR 133.[1] The photographs were admitted before the jury. 3 RR 152.

At the second out-of-presence hearing, the State proffered the testimony of Detective Shane Kirkland, a 16-year veteran officer with five years' experience in the gang unit. 3 RR 178. He was trained to look for characteristics of someone holding himself out as a gang member, including a person's "manner of dress," criminal activity, how he represents himself on social media, and whether he associates with others holding themselves out as gang members. 3 RR 178-79. Det.

[1] Appellant never corrected the trial court's impression that his relevance objection to evidence of "holding out" went to Det. Kirkland's testimony. Consequently, no relevance objection was preserved as to the photos.

Kirkland identified several characteristics in Appellant's photos suggestive of gang membership: Appellant's use of hand signals or "gang signs," the color red,[2] a catch phrase that sums up what the gang is all about (in this case "money, power, respect"), his boasting display of marijuana and cash laid out in front of him, and his pointing the gun sideways in one hand and making a gang sign with the other while his associate was "throwing" a "double gang sign." 3 RR 179-81. Based on these photographs, Kirkland opined that even if he was not a gang member, Appellant was holding himself out as one. 3 RR 181. The detective admitted he had no personal knowledge that Appellant was in a gang but testified that people do not generally hold themselves out as gang members unless they are. 3 RR 181, 186.

Appellant argued that, without evidence that he was in a gang, the testimony was more prejudicial than probative. 3 RR 188-89. The trial court asked the State whether it intended to argue that Appellant was in a gang, and the prosecutor said that his holding himself out as a gang member was relevant either way but added that it was a reasonable deduction. 3 RR 190. The trial court then stated:

> The Court's going to find that the evidence being offered does have probative value with regard to the character of the defendant and it is relevant. The Court's going to find that the state is entitled to put on evidence of his character and that this evidence clearly goes to

[2] As the court of appeals observed, Det. Kirkland wrongly attributed the color red to the "Crips" gang in his testimony during the hearing. 3 RR 179, 185; *Beham*, 2017 Tex. App. LEXIS 4595, at *3 n.2.

> the character of the defendant. The Court's going to find the probative value of this does not [sic] outweigh bias or prejudice and that, while there's a risk of some prejudice here, that it is not so great as long as the – as the state does not attempt to argue that the defendant is in a gang and that that is an extraneous bad act. As long as the state is limiting its offer of this evidence merely to the character of the defendant, the Court's going to permit that. Should the state go outside those bounds, we'll reconsider this issue.

3 RR 190-91.

Before the jury, Det. Kirkland testified about the characteristics he looks for, the crimes gangs are typically involved with, and the characteristics he identified in the five photographs. 3 RR 193-97. He opined that Appellant was holding himself out as a gang member in the photos based on the use of gang signs, the color red, a gang-like motto, and the display of narcotics, money, and weapons. 3 RR 197. Det. Kirkland clarified that he had no specific knowledge that appellant was in a gang but that, based on his training and experience, in these photos, Appellant was holding himself out to be. *Id*. He also testified that gangs were territorial and would not generally allow someone to make a false claim of membership. *Id.*

On appeal, Appellant argued Det. Kirkland's testimony should have been excluded because it was not relevant and was more prejudicial than probative. App. COA Br. at 10, 14, 17. Citing *Beasley v. State*, 902 S.W.2d 452 (Tex. Crim. App.

1995), the court of appeals agreed that Kirkland's testimony[3] was not relevant or admissible without proof of Appellant's gang membership and the illegal activities of that particular gang. *Beham*, 2017 Tex. App. LEXIS 4595, at *9-10. The court did not address Appellant's second issue that the testimony was inadmissible under Rule 403. *Id*. at *19.

SUMMARY OF THE ARGUMENT

The State was not offering conventional gang membership evidence; the gang expert testified that Appellant was holding himself out as a member. The court of appeals erred in extending the requirements of the former kind of evidence to the testimony here. Unlike conventional gang membership evidence, the expert's testimony had relevance because it provided insight into Appellant's character, how he wanted others to perceive him, and his potential future criminal behavior—independent of his actual membership in a particular gang. The court of appeals erred in conflating the two kinds of evidence.

Also, the court's harm analysis failed to consider that the Facebook photos would have had a similar impact on the jury's punishment verdict as the gang expert's testimony.

[3] Although the court sometimes referred to the error as admission of "gang-related evidence," this cannot fairly include the photographs because that objection was neither preserved nor urged on appeal.

ARGUMENT

I. Is expert opinion testimony that a defendant holds himself out as a gang member—without proof he is one—relevant to sentencing?

Yes. While evidence of gang membership and the gang's activities are typically required for a defendant's connection to a gang to be relevant to punishment, that is not so here. Appellant's public desire to look like a gang-banger says as much, if not more, than actually being one. The court of appeals erred in treating the two kinds of evidence the same.

A. Evidence is relevant if it helps the sentencer

The legislature has repeatedly broadened what is admissible at the punishment phase. *Ellison v. State*, 201 S.W.3d 714, 722 (Tex. Crim. App. 2006). It now includes extraneous offenses, the defendant's character, a laundry-list of other factors, and the proviso that the list is not exclusive.[4] *Id*.; TEX. CODE CRIM. PROC. art. 37.07,

[4] At punishment, "evidence may be offered . . . as to any matter the court deems relevant to sentencing, including but not limited to

- the prior criminal record of the defendant,
- his general reputation,
- his character,
- an opinion regarding his character,
- the circumstances of the offense for which he is being tried, and,
- notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed the defendant . . ."

§ 3(a)(1). The only limitation on what is admissible is that it must be "relevant to sentencing." *Id.* Evidence is relevant under Rule 401 if it has "any tendency to make a fact more or less probable than it would be without the evidence" where "the fact is of consequence in determining the action." TEX. R. EVID. 401. Deciding what punishment to assess is a normative process without discrete fact-issues, and so the question of what evidence is admissible at the punishment phase of a non-capital felony trial is a function of policy, not logical relevance. *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002). What is relevant "should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Id.*

B. The gang expert's testimony was relevant in its own right

Here, the gang expert's testimony that Appellant was holding himself out as a gang member would have been helpful to the jury in setting a punishment appropriate for him because it showed his character[5]—that he idolized violence and crime, and wanted others to view him as capable of such conduct. Like evidence of prior criminal history, his posing as a drug-dealing and violent gangster made it far

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TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1) (bullets added).

[5] "Character" includes "[a] person's fixed disposition or tendency, as evidenced to others by his habits of life. . . ." BLACK'S LAW DICTIONARY, at 232 (6th ed. 1990).

more likely that he would engage in such behavior in the future. "[W]e are what we repeatedly do." Will Durant, STORY OF PHILOSOPHY at 98 (interpreting Aristotle). Even if future-dangerousness was not a specific issue at trial, preventing the likelihood of recurrence of criminal behavior, as a Penal Code objective, was relevant to sentencing. TEX. PENAL CODE § 1.02(1)(c). Admission of this evidence would provide more complete information for the jury to tailor an appropriate sentence, another policy to consider in determining whether to admit evidence at punishment. *See Sunbury*, 88 S.W.3d at 233-34. "Highly relevant — if not essential — to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 246 (1949). And as Appellant had filed a motion for community supervision, it was reasonable to think a jury's decision on that issue might be better informed if it knew Appellant revered the gangster lifestyle. *See Sims v. State*, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008) ("In determining whether the appellate can adequately complete the demands of community supervision, a sentencer might rationally want to take into account testimony that the appellant lied to a peace officer.").

C. The gang expert's testimony was reputation evidence by design

Det. Kirkland's opinion based on the Facebook postings was also admissible as evidence of (or similar to) the defendant's "general reputation." TEX. CODE CRIM. PROC. art. 37.07, § 3(a). Reputation is the community's collective impressions of a defendant. The evidence that the State was offering was better; it reflected exactly the kind of image Appellant wanted others to perceive. Dangerous. Threatening. Illicit drug dealer. This information would have been helpful to understanding the circumstances of the offender, and thus allow the jury to tailor the sentence to the particular defendant. *See Sims*, 273 S.W.3d at 295.

Because Det. Kirkland's testimony was relevant to the jury's determination of an appropriate punishment for Appellant, the court of appeals erred to hold otherwise.

D. Actual Membership is a Red Herring

The court of appeals erred to impose the prerequisites for admitting gang-membership evidence on the evidence admitted here. *Beham*, 2017 Tex. App. LEXIS 4595, at *6-9 (citing *Beasley*, 902 S.W.2d at 457).[6] A number of cases hold

[6] *Beasley* is a plurality decision interpreting a prior, narrower version of Article 37.07 that did not permit the admission of unadjudicated bad acts at punishment. *Beasley*, 902 S.W.2d at 455.

that "[i]n order to prove the relevance of a defendant's membership in an organization or group, the state must show: (1) proof of the group's violent and illegal activities, and (2) the defendant's membership in the organization." *Davis v. State*, 329 S.W.3d 798, 805 (Tex. Crim. App. 2010) (defendant's connection to Satanism); *Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995) (membership in Aryan Brotherhood); *see also Dawson v. Delaware*, 503 U.S. 159, 160 (1991) (connection to Aryan Brotherhood). This line of cases is inapposite, however, because the State was not attempting to prove Appellant was in a gang.[7]

Proof of membership makes sense for conventional gang-membership evidence. There, relevance depends on the ability to distill a violent character trait from membership. *Cf. Dawson*, 503 U.S. at 166 ("A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future."). If the defendant is not actually a member, then the behavior and habits of the group cannot be extended to him and the character of the group can say nothing

[7] The court of appeals also cited *Sierra v. State*, 266 S.W.3d 72, 78 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). *Beham*, 2017 Tex. App. LEXIS 4595, at *7-8. To the extent *Sierra* suggests that proof of the gang's illegal and violent activities is a required predicate for admission of gang-membership evidence, that holding is inapplicable for the same reasons as *Beasley*, *Davis*, *Mason,* and *Dawson*.

about the defendant's character.[8] The testimony here was not an attempt to vilify Appellant through the conduct of others that he has a tenuous connection to. As argued above, the fact that Appellant was holding himself out as a gang member speaks to his character, values, and potential aspirations—independent of his actual membership. The court of appeals erred in overlooking this.

E. *Res Ipsa Loquitur*: Illegal and Violent Activities

In addition to requiring evidence of Appellant's membership, the court of appeals erroneously required evidence of the second condition set out in conventional gang-evidence cases: proof of a particular gang's unlawful or violent acts. *Beham*, 2017 Tex. App. LEXIS 4595, at *9. As a plurality of this Court explained in *Beasley* and *Anderson v. State*, for the jury to assess the defendant's character based on gang affiliation, the jury needs to know about the activities of the gang or else they cannot determine if his affiliation is a positive or negative aspect

[8] This rationale extends to any undesirable group. In *Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009), the State offered evidence at the punishment phase of the defendant's possession of methamphetamine trial about the general societal ills caused by other people's meth habits: two deaths from poisonous gas from a meth lab in another county, the cost to subsidize the health care costs of a woman who used meth during her pregnancy, and thefts that occur after addicts lose their jobs and turn to crime. *Id*. at 713. This Court held that these unconnected cases were not helpful to the jury in determining an appropriate sentence for Lane and thus were irrelevant. *Id*. at 714. Similarly, in the conventional gang membership context, unless the defendant is shown to be a member, the gang's activities (and bad character) have nothing to do with him.

of his character. *Beasley*, 902 S.W.2d at 456; *Anderson*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995) (plurality op.). In *Dawson*, the prosecution's failure to prove the Aryan Brotherhood's unlawful or violent activity rendered his connection to the group irrelevant to sentencing.[9] 503 U.S. at 166-67.

Here, however, Appellant's posing was necessarily tied to both unlawful and violent acts. He was emulating street gangs in general, the nature of which inherently involves criminal activity. *See* TEX. PENAL CODE § 71.01(d) (defining "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly association in the commission of criminal activities."); Merriam Webster Dictionary Online, www.merriam-webster.com, *last visited Nov. 7, 2017* (defining "gang" in part as "GROUP: such as (1): a group of persons working together (2): a group of persons working to unlawful or antisocial ends; *especially*: a band of

[9] While the prosecution did prove the group's abstract racist beliefs, these beliefs and any inference that Dawson shared them were protected by the First Amendment and could not be used at sentencing. 503 U.S. at 166-67. Appellant, however, did not raise a First Amendment claim at trial. Regardless, his conduct in pointing the handgun at the camera and flaunting his illegal drug proceeds has relevance to issues outside the protection of the First Amendment. *See Mason*, 905 S.W.2d at 576 (finding defendant's membership in Aryan Brotherhood was outside First Amendment protection where State offered proof of gang's drug activities, prostitution, weapons manufacture, prison escapes, contract killings, and assaultive behavior).

antisocial adolescents"). If the State were trying to prove a connection between Appellant and a specific group, particularly a less notorious one, evidence of that group's activities might be needed to assess what that connection meant. But here, the purpose of street gangs is widely known. The relevance of the testimony came not from Appellant's connection to any particular gang but his reverence for what gangs stand for. Though the jury hardly needed it, Det. Kirkland testified about the crimes gangs are typically involved in. 3 RR 193-94 ("aggravated robberies, robberies, drug sales, drug trafficking, thefts, assaults on rival gangs or aggravated assaults on rival gang members or just people in general"). The jury needed no further information about what gangs do to understand how his desire to be seen as a gang member should reflect on his character.

Because the court of appeals erroneously treated Det. Kirkland's testimony as gang membership evidence and failed to recognize its relevance to punishment apart from actual membership, this Court should reverse the court of appeals's merits decision.

II. In assessing harm, did the court of appeals err in failing to isolate the opinion testimony from the photographs on which that opinion was based?

Yes. The court of appeals found harm from admission of the gang expert's opinion that Appellant was holding himself out as a gang member but failed to

explain how this affected his substantial rights when similar evidence was admitted through the Facebook photos.[10] *See* Tex. R. App. P. 44.2(b). An erroneous ruling on the admission of evidence will not result in reversal when similar, unchallenged evidence was also admitted. *Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010); *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). In assessing the likelihood that the jury's decision was adversely affected by an error, the reviewing court should consider all the testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, and closing arguments. *Thomas v. State*, 505 S.W.3d 916, 927 (Tex. Crim. App. 2016). The court of appeals, however, highlighted the State's closing argument—"People put stuff on social media that they want [you] to know about them. . . . He puts pictures of drugs and money and gang signs. That's the type of person he is"—but did not isolate the harm it believed resulted from Det. Kirkland's testimony apart from the photographs. *Beham*, 2017 Tex. App. LEXIS

[10] As observed earlier, Appellant did not clarify that he was also objecting to the photographs when the trial court ruled that his objection to evidence he was "holding [himself] out" was premature. 3 RR 132-33. Consequently, this objection to the Facebook photos was not preserved. Nor was admission of the photos challenged on appeal. *See* App. COA Br. at 10, 14, 17.

4595, at *18; 4 RR 12. Given the trial court's distinct rulings concerning the photographs, which were not challenged on appeal, the court of appeals erred in failing to confine its analysis to Det. Kirkland's testimony.

A proper harm analysis would have found any error in admitting the expert testimony had slight, if any, effect. The jury would have reached many of the same negative character judgments about Appellant from the photographs themselves. Gang signs and red and blue bandanas have a strong enough association in popular culture with gangs that, even without Det. Kirkland's testimony spelling it out, the inference from posting these photos to Facebook is that Appellant wanted others to see him as a gang banger. Gang associations aside, Appellant's flaunting his drugs and money and pointing a gun at the camera would have had a negative impact on jurors' assessment of an appropriate sentence, and the court of appeals erred in not considering the alleged error in this context. *See McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (proper harm analysis "would have to take into account" evidence unchallenged on appeal that was essentially cumulative of erroneously admitted evidence); *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999) (finding any error in admitting exhibit harmless where testimony relayed the same information).

The court seemed to find harm only because it was treating Det. Kirkland's testimony not for what it was—evidence that Appellant was posing as a gang member—but for how it could be misused:

> As opposed to merely submitting the photographs alone and raising inferences therefrom, the addition of Kirkland's expert testimony of what [Appellant] held himself out to be gave significant credibility to the State's attempt to paint [Appellant] as a violent gang member deserving of a severe sentence even though Kirkland admitted that he had no knowledge or information that [Appellant] was ever actually in a gang.

Beham, 2017 Tex. App. LEXIS 4595, at *18. But this is not what occurred. Even though the State initially told the trial judge that Appellant's membership was a rational deduction from the evidence, 3 RR 190, the trial court ruled that Det. Kirkland's testimony would be admitted "as long as . . . the state does not attempt to argue that the defendant is in a gang," and Appellant never contended at trial that the State crossed that line. 3 RR 191. There was no objection to improper jury argument, and in fact, the State told the jury in its final closing argument,

> I don't care if [Appellant is] in a gang. The pictures are designed to show you that's what he wants people to think about him, and in a shocking [turn] of events after he displays that to the public he holds a woman up at gunpoint. Y'all do with that information what you want to do. All this is-he-or-is-he-not-in-a-gang, I don't care. I want y'all to look at the pictures and see his dope and money and guns on his Facebook profile. That's what the evidence is designed to show you.

4 RR 24.

This Court should find the error harmless or remand for a harm analysis that considers the alleged error for what it was and in light of the admitted photos.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals (1) reverse, find the testimony was relevant to punishment, and remand to the court of appeals to consider Appellant's remaining Rule 403 issue, (2) reverse, find any error harmless, and remand for the remaining issue, or (3) reverse and remand to the court of appeals for a proper harm analysis.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 4,238 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of November 2017, the State's Brief was e-served on the parties below:

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